STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

vs. SC No. 128294

JOEZELL WILLIAMS II,

Defendant-Appellant

Lower Court No. 02-004374
Court of Appeals No. 246706

128294
Supl

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PEOPLE'S APPLICATION FOR LEAVE TO APPEAL

g/p

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

The People applied to this Court for leave from the January 27, 2005 decision of the Court of Appeals which affirmed in part and vacated Defendant's conviction of larceny from a person.[1] The People argued that *People v Bigelow,*[2] requiring the vacating of a predicate felony conviction whenever a first-degree murder is based on a "felony-murder" theory is flawed. That opinion required the Court of Appeals to vacate Defendant's conviction and sentence for larceny from a person, the predicate felony to Defendant's felony-murder conviction, even though the jury had also convicted him of the additional count of first-degree murder based on the alternative theory of premeditation. The People argued that where a defendant is convicted under alternative theories of first-degree murder, a conviction of the predicate felony to felony-murder does not violate double jeopardy. Therefore, *Bigelow* must be modified.

On October 14, 2005, this Court ordered oral argument on the People's Application and directed the parties to file supplemental briefs discussing the following issues:

(1) Whether *People v Bigelow* was decided correctly;

(2) Whether, if the rule in *Bigelow* is followed, but the felony-murder conviction is reversed or vacated on appeal or in habeas proceedings, there are important real-world consequences that flow from the prior vacating of the predicate felony underlying the subject felony-murder conviction, and

(3) in particular, whether a previously vacated predicate felony can be "revived" if the felony-murder conviction is reversed or vacated on appeal or in habeas proceedings.

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[1] *People v Williams*, 265 Mich App 68 (2005).

[2] *People v Bigelow (Amended Opinion),* 229 Mich App 218, 220-221 (1998).

STATEMENT OF QUESTION PRESENTED

I.

Both the United States and Michigan Constitutions prohibit multiple punishments where not legislatively authorized. Even if conviction and sentence for both first-degree murder on a theory of felony-murder and the predicate felony violates jeopardy, if conviction for first-degree murder is also supported by the alternative theory of premeditation, so that the separate conviction is no longer necessarily predicate, does conviction and sentence for the predicate felony violate jeopardy?

The Court of Appeals answered: YES
The People answer: NO
Defendant answers: YES

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The People adopt the statement of facts in their application for leave to appeal.

ARGUMENT

I.

Both the United States and Michigan Constitutions prohibit multiple punishments where not legislatively authorized. Even if conviction and sentence for both first-degree murder on a theory of felony-murder and the predicate felony violates jeopardy, if conviction for first-degree murder is also supported by the alternative theory of premeditation, so that the separate conviction is no longer necessarily predicate, conviction and sentence for the predicate felony does not violate jeopardy.

In its October 14, 2005 Order, this Court directed the parties to file supplemental briefs discussing three issues.

First, this Court asked whether *People v Bigelow*[3] was decided correctly. The People agree that the special panel correctly adopted *People v Zeitler*[4] thus overruled *People v Passeno*[5] on the question of merger of theories of first-degree murder for one death. But, *Bigelow* incorrectly requires vacating of the predicate felony where that first-degree murder conviction is supported also by a theory of premeditation.

Bigelow was convicted by a jury of separate counts of first-degree premeditated murder, first-degree felony-murder, and breaking and entering an occupied dwelling to commit a larceny.[6] In his initial appeal, Court of Appeals vacated the defendant's felony-murder conviction pursuant to *People*

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[3]*Supra*, *Bigelow*, 229 Mich App 218.

[4]*People v Zeitler*, 183 Mich App 68 (1990).

[5]*Bigelow, supra,* 229 Mich App 220-221; *People v Passeno*, 195 Mich App 91, 95 (1992).

[6]*People v Bigelow,* 225 Mich App 806 (1997).

v Passeno.[7] The Court of Appeals also ordered that a special panel be convened to resolve a conflict between *Passeno* and *People v Zeitler*[8] and rule which decision should be followed when a defendant stands convicted of both premeditated murder and felony-murder arising from death of single victim.[9]

The special panel in *Bigelow* held that the appropriate remedy to protect the defendant's rights against double jeopardy is to modify his judgment of conviction and sentence to specify one first-degree murder conviction supported by two theories: premeditated murder and felony-murder, pursuant to the court's earlier ruling in *People v Zeitler.*[10] Quoting the first *Bigelow* Court, the special panel stated that the interests of justice are better served by *Zeitler* by protecting against circumstances that could occur in later appeal, "once the felony-murder basis of a defendant's first-degree murder conviction is vacated, and the order has become effective, this ground to support the conviction is gone forever. If on further appeal another court were to find insufficient evidence of premeditated murder, the first-degree murder conviction would be reversed and vacated in total because no basis would remain to support the conviction. Such a result would be unjust and absurd, particularly for a criminal such as defendant who has clearly committed felony-murder."[11]

The *Bigelow* holding thus resolved the dual conviction problem by merging the defendant's separate convictions and sentences to avoid multiple punishments in violation of double jeopardy.

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[7] *Id,* 225 Mich App at 807, citing *Passeno*, 195 Mich App at 95.

[8] *Zeitler, supra.*

[9] *Bigelow, supra,* 225 Mich App at 806.

[10] *Zeitler, supra*, 183 Mich App 68.

[11] *Bigelow, supra* 229 Mich App at 220, citing *Bigelow, supra* 225 Mich App at 808.

In the second part of its opinion, the special panel addressed the issue of whether the defendant's conviction for the predicate felony violated double jeopardy. This argument was first raised by the defense during its oral argument before the special panel, was never discussed in the first *Bigelow*[12] appeal, and presumably never briefed by the parties up to that point.[13] During oral arguments, the prosecutor conceded that the defendant's conviction of breaking and entering must be vacated on double jeopardy grounds if his conviction of felony-murder was upheld. Thus, there being no disputed issue before it, the special panel agreed that convictions and sentences for both felony-murder and the predicate offense violated double jeopardy and, citing *People v Gimotty*,[14] vacated the defendant's breaking and entering conviction and sentence.[15]

For the following reasons, the special panel incorrectly decided the issue of how double jeopardy applied to Bigelow's convictions and whether his separate conviction for the underlying felony should be vacated.

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[12]*Bigelow, supra,* 225 Mich App 806.

[13]*Bigelow, supra*, 229 Mich App at 221.

[14]*People v Gimotty*, 216 Mich App 254, 259-260 (1996).

[15]*Bigelow, supra*, 229 Mich App at 221-222.

■ THE LEGISLATURE INTENDED THAT THERE BE MULTIPLE PUNISHMENTS FOR FIRST-DEGREE FELONY-MURDER AND THE UNDERLYING FELONY

In the multiple punishment context, the Double Jeopardy Clauses of the United States and Michigan Constitutions seek to ensure that the defendant's total punishment will not exceed the scope of punishment provided by the Legislature.[16] As the predicate-based offenses and their predicate offenses are "legislatively related" rather than "logically related," the Legislature intended to create separate offenses for which multiple punishments may be had so that convictions and sentences for both offenses do not offend the right against double jeopardy. The overall statutory scheme of the first-degree murder statute reflects that felony-murder is a category of murder, not

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[16] US Const, Am. V; Const 1963, art 1, §§ 15; *People v Denio,* 454 Mich 691, 706 (1997); *People v Sturgis*, 427 Mich 392, 398 (1986).

In *People v Nutt,* 469 Mich 565 (2004), the Supreme Court adopted the "same element" test as set forth in *Blockburger v United States,* 284 US 299, 52 S Ct 180, 76 L Ed 2d 306 (1932), for reviewing claims that a successive prosecution for the "same offense."*Nutt*, 469 Mich at 588. The *Nutt* Court, however, limited its holding to questions of successive-prosecutions, stating that it was not concerned with the meaning of the term "offense" as it applies to the double-jeopardy protection against multiple punishments. *Id,* at 575 n. 11.

Thus, *People v Robideau,* 419 Mich 458 (1984), continues to govern a court's analysis of multiple-punishments claims in Michigan. It held that the purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant from having more punishment imposed than the Legislature intended. *Id,* 419 Mich at 485; *People v Ford,* 262 Mich App 443, 447-448 (2004); *People v Meshell,* 265 Mich App 616, 628-629 (2005).

Other jurisdictions also hold that legislative dictates whether a defendant is liable to serve multiple-punishments. *Ohio v Johnson,* 467 US 493, 498-499, 104 S Ct 2536, 2540, 81 L Ed 2d 425 (1984); *Albernaz v United States,* 450 US 333, 344, 101 S Ct 1137, 1145, 67 L Ed 2d 275 (1981) ("[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed"); *Whalen v United States,* 445 US 684, 688, 100 S Ct 1432, 1436, 63 L Ed 2d 715 (1980) ("[T]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized"); *Brown v Ohio,* 432 US 161, 165, 97 S Ct 2221, 2225, 53 L Ed 2d 187 (1977) ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments").

merely an enhanced form of the underlying felony.[17] "The predicate felonies are used to differentiate the crime from the other two types of first-degree murder, and from second-degree murder, rather than merely to enhance the penalty for the enumerated predicate felonies."[18]

Moreover, by enacting the felony-murder statute, the Legislature created a separate crime to those enumerated felonies that may be used to distinguish felony-murder from those committed with premeditation. This separate statutes serve to prohibit conduct that is violative of distinct social norms so that the statutes can be viewed as separate and amenable to permitting multiple punishments.[19] In her concurring/dissenting opinion in *Harding*,[20] Justice Riley addressed the distinct social harms for the offenses of first-degree felony-murder and armed robbery, the underlying felony in that case. She observed that while first-degree murder focused upon homicide, the crime of armed robbery focused upon the violent deprivation of property. "The first-degree murder statute does not punish the taking of property except when accompanied by a homicide. Nor does the armed robbery statute punish homicide." Thus, the societal interests of the two offenses were independent and distinct. "Felony murder is designed to punish homicide committed in the course of aggravated circumstances, while the societal interests undergirding the enumerated felonies are independent and also important to maintain." Justice Riley concluded that the Legislature

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[17]MCL § 750.316; See Justice Corrigan's dissent in *People v Curvan*, 473 Mich 896, 903-904 (2005).

[18] *Curvan, supra* 473 Mich at 904.

[19] *Robideau, supra*, 419 Mich at 487.

[20] *People v Harding,* 443 Mich 693 (1993).

"carefully crafted distinct offenses defending separate societal interests that defendants violated. Punishment for each offense was intended by the Legislature."[21]

In *Wilder*,[22] this Court had found a state double jeopardy violation where the defendant was convicted and sentenced for first-degree felony-murder and armed robbery on the basis that the evidence needed to prove first-degree felony-murder required proof of the underlying lesser-included felony.[23] The *Wilder* majority opinion undertook none of the analysis that this Court did in *Robideau* in determining the legislative intent, i.e. whether the two offenses address the same or different social evils, and the comparative severity of the sentences authorized by the Legislature for each. Inasmuch as the *Wilder* majority opinion is based on unsound foundations, and because application of appropriate principles to discern legislative intent, primarily looking at the different social harms that the first-degree felony-murder statute and the armed robbery statute are designed to address, weighs in favor of a determination that the Legislature did intend multiple convictions and sentences, *Wilder* should be overruled.[24]

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[21] *Harding, id*, 443 Mich at 732-733.

[22] *People v Wilder,* 411 Mich 328 (1981).

[23] *Wilder, id*, 411 Mich at 342.

[24] Other jurisdictions support Justice Riley's view that their respective legislatures intended to allow multiple punishments for felony-murder and the underlying felony on the basis of the distinct interests protected. *Todd v State*, 884 P2d 668, 677-680 (Alaska App., 1994); *State v Godsey*, 60 SW 3d 759 (Tenn, 2001); *Fitzgerald v Commonwealth*, 223 Va 615, 636-637 (Va.,1982); *State v Greco*, 216 Conn 282, 295-296 (Conn.,1990); *Talancon v State*, 102 Nev 294 (Nev.,1986); *State v Crump*, 232 Kan 265, 270 (Kan,1982), where the Kansas Supreme Court specifically rejected the defendant's argument that the Kansas Court should adopt the decision of the Michigan Court in *Wilder, supra.*

- **WHERE A DEFENDANT IS ALSO CONVICTED OF THE ALTERNATIVE THEORY OF PREMEDITATION, A SEPARATE FELONY CONVICTION IS NO LONGER NECESSARILY PREDICATE SO A CONVICTION AND SENTENCE FOR THAT FELONY DOES NOT VIOLATE JEOPARDY.**

Even if this Court continues to embrace *Wilder,* in so far as *Bigelow* relied on *People v Gimotty*[25] for vacating the underlying felony, its reasoning was flawed since *Gimotty* reviewed double jeopardy as it related to convictions of felony-murder and the predicate felony only.[26] Because there was no alterative theory upon which the defendant's first-degree murder conviction was based, the *Gimotty* Court ruled in accordance with the prevailing law.[27] In contrast, the jury in *Bigelow,* as in the present case, convicted the defendant of both premeditated murder as well as felony-murder. Since the separate conviction for the underlying is no longer necessarily predicate, conviction and sentence for that felony does not violate jeopardy.[28]

This Court recognized this precise distinction in *People v Harding.*[29] While this Court held that the defendants's convictions and sentences for felony-murder and the predicate offense of armed robbery violated double jeopardy, it noted that had the defendants been convicted of robbery and first-degree premeditated murder instead, "they would have been convicted of separate offenses with

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[25]*People v Gimotty*, 216 Mich App 254 (1996).

[26] *Id*, 216 Mich App 259-260.

[27]*Passeno, supra*, 195 Mich App 91; *Wilder, supra,* 411 Mich at 352.

[28]As Judge O'Connell, a member of *Bigelow* panel, stated in his dissenting opinion here, double jeopardy is not offended by conviction for premeditated murder and larceny, so that "[[t]o strike the larceny conviction, even at the direction of an analytically deficient precedent, effectively nullifies defendant's conviction and sentence for premeditated murder, notwithstanding the fact that a jury verdict supports the conviction and authorizes the consequent punishment." *Williams, supra.*

[29]*Harding, supra,* 443 Mich 693.

different objectives arising out of the same transaction."[30] "If they had been convicted of robbery and premeditated murder, they could, under the tests that we laid down in *Robideau* and adhere to today, be punished for each offense because each carries a separate societal objective and neither aggravates the other."[31]

The same conclusion holds true in the many instances where a defendant is convicted of felony-murder as well as premeditated murder and the underlying felony. Since the separate felony conviction is no longer necessarily predicate, a conviction and sentence for that felony does not violate jeopardy. Other jurisdictions have adjudicated this point. The Maryland Supreme Court found that there was no double jeopardy violation, and thus no need to merge the underlying robbery conviction to the murder conviction, where the jury specified that it found the defendant guilty of both premeditated murder and felony-murder charges.[32] That Court stated that when "the trier of fact returns a guilty verdict of premeditated murder...the underlying felony and the murder in that situation contain an element not required in the other....The armed robbery convictions did not,

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[30] *Harding, id,* 443 Mich at 710, n 18.

[31] *Id.*

[32] *Borchardt v State,* 367 Md. 91, 142 (2001). The *Borchardt* Court distinguished its facts from those in *State v Frye*, 283 Md 709 (1978), where the first-degree murder statute provided for one murder charge supported by either premeditation or a felony-murder theory. In *Frye* and similar jurisdictions where the juries are not required to specify under which theory it relied, the courts are forced to rule in the defendant's favor that the jury convicted on the felony-murder theory. Thus, those courts vacate the defendant's separate conviction on the underlying felony. The reasoning, of course, is that without specificity, the court cannot presume that the jury convicted the defendant on the alternative theory for which the underlying felony would not be a predicate. *Frye, id; State v Hegstrom* 401 So 2d 1343 (Fla., 1981); *State v Villani,* 491 A2d 976 (RI, 1985); *Alverson v State,* 983 P 2d 498 (Okla Crim App,1999); *Byrd v United States* , 500 A 2d 1376, 1388 (DC,1985).

therefore, merge into the premeditated murder convictions...and the imposition of separate sentences for the robberies was permissible."[33]

As a matter of logic, *Bigelow's* ruling, as it pertains to felonies supported by an alternative theory was erroneous and should be modified.

- **INCONSISTENT TREATMENT OF LIKE ISSUE LEADS TO CONFUSION AND INEFFICIENT USE OF JUDICIAL RESOURCES**

Next, this Court asked the parties to answer whether, if the rule in *Bigelow* is followed, but the felony-murder conviction is reversed or vacated on appeal or in habeas proceedings, there are important real-world consequences that flow from the prior vacating of the predicate felony underlying the subject felony-murder conviction, and in particular, whether a previously vacated

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[33] *Borchardt id*, 367 Md at 142-143.

Similarly, in *Whittlesey v State* 340 Md 30 (1995), the defendant was suspected of robbing and killing his victim but only charged and convicted of robbery and theft counts since the police did not find the victim's body. Eight years later, the victim's body was discovered and the defendant was charged and convicted of felony-murder and premeditated murder. *Id,* 43-44. Defendant concedes that there was no double jeopardy bar from trying him for premeditated murder, but argued that his felony-murder conviction was a violated double jeopardy. The Maryland Court of Appeals disagreed. Citing *State v Frye*, 283 Md 709 (1978), the court reasoned that if a first-degree murder conviction is premised upon independent proof of premeditation and deliberation, then the murder, even though committed in the course of a felony, would not be the same offense as the felony. "Consequently, under long-established double jeopardy principles, the double jeopardy prohibition does not bar the prosecution of a defendant for an intentional homicide, even though the defendant was earlier prosecuted and convicted for robbing, raping, or kidnapping the same victim. See, e.g., *Bowers v State*, 298 Md. 115, 140-43, 468 A.2d 101, 114-16 (1983) (earlier kidnapping prosecution and conviction did not preclude subsequent murder prosecution where the murder prosecution was based on proof of willfulness, premeditation and deliberation)." *Whittlesey*, 340 Md at, 75-76.

In *State v Mata*, 266 Neb 668, 695 (2003), this issue was dealt with in a different manner and the Nebraska Supreme Court found not violation of the Double Jeopardy Clause. There, although the jury found that the State had carried their burden under both theories of first-degree murder and convicted the defendant of both premeditated murder and felony-murder, the defendant's sentencing order reflected a conviction and sentenced only for first-degree premeditated murder and kidnapping. The defendant's conviction for first-degree felony-murder was neither set aside or merged, but simply ignored. *Id,* 266 Neb at 696-697.

predicate felony can be "revived" if the felony-murder conviction is reversed or vacated on appeal or in habeas proceedings.

Responding in reverse order, while authority exists in other jurisdictions that a previously vacated felony can be "revived" or reinstated, the problem, and hence, the "real-world consequence" is that such a practice would lead – and, in fact, has lead – to extensive litigation, confusion, and the inefficient use of judicial resources.[34]

"Reviving" or "reinstating" a conviction that has been "vacated" is not a simple task. Both *Bigelow* Courts expressed concern that "vacating" the felony-murder conviction meant that it was extinguished and "gone forever." The real-world consequence was that if on appeal another court found insufficient evidence of premeditated murder, and thus reversed the only remaining basis for the first-degree murder conviction, a defendant who was convicted beyond a reasonable doubt of having committed felony-murder would go free.[35] This is what Justice Corrigan referred to as the "dangerous consequences in the real world" in her *Curvan* dissent.[36]

Justice Corrigan was not alone in her concerns. In *United States v Lindsay,*[37] the Second Circuit echoed this fear that by vacating a conviction due to jeopardy problems, a later reversal of the remaining conviction would "permit the defendant to completely escape punishment for his

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[34] *United States v Ganci,* 47 F3d 72, 74 (CA 2 (NY),1995).

[35] *Bigelow, supra,* 229 Mich App at 220 citing *Bigelow, supra* 225 Mich App at 808. Similarly, in *Curvan, supra,* this Court expressed disagreement on the issue of whether a previously vacated conviction could be reinstated. See Justice Kelly's concurring opinion and Justice Corrigan's dissent. *Id,* 473 Mich at 896-898.

[36] *Curvan, supra* 473 Mich at 898.

[37] *United States v Lindsay,* 985 F 2d 666 (CA2 (NY),1993).

crime."[38] That court held that instead of "vacating" conviction under these circumstances, the better practice was to *merge* the lesser conviction to the greater specifying that the conviction would not be "merged out of existence."[39] Similarly, in *United States v Aiello*,[40] the court observed that the Supreme Court in *Ball*,[41] which held that concurrent sentences did that remedy jeopardy problems, failed to address the "possibility that the greater offense on which the district court imposed judgment on remand might subsequently be reversed, and thereby permit the defendant to completely escape punishment for his crime."[42]

To avoid the illegal consequences of simply imposing concurrent sentences,[43] various jurisdictions have attempted to resolve this issue in three different ways. While some courts continue to vacate both the conviction and sentence of the jeopardy-prohibited offense,[44] others

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[38] *Lindsey, supra,* citing *United States v Aiello*, 771 F 2d 621, 634 (2d Cir1985). Also see *State v Chicano,* 216 Conn 699, 721-722 (Conn,1990).

[39] *Id*, 985 F 2d at 670 -671, quoting *United States v Osorio Estrada*, 751 F 2d 128, 135 (2d Cir1984), modified on reh'g on other grounds, 757 F2d 27, cert denied, 474 US 830, 106 S Ct 97, 88 L Ed 2d 79 (1985).

[40] *Aiello, supra*, 771 F 2d 621.

[41] In *Ball v United States*, 470 US 856, 865, 105 S Ct 1668, 84 L Ed.2d 740 (1985), the Supreme Court held that imposing concurrent sentences did not render harmless multiple punishment where the Legislature did not provide for separate punishments since concurrent sentences still carried the potential adverse collateral consequences that stem from a separate conviction. (collateral consequences might include delayed parole eligibility, increased sentence under recidivist statute for future offense, and impeachment of defendant's credibility). *Id.*, 470 US at 865.

[42] *Aiello, id.* 771 F 2d at 634.

[43] *Ball, supra,* 470 US at 865.

[44] *Kochersperger v State,* 725 N E2d 918, 925 -926 (Ind App, 2000); *United States v Baylor,* 97 F 3d 542, 548-549 (CA DC,1996); *United States v Rosario,* 111 F3d 293, 300 -301 (CA 2 (NY),1997); *Jones v State,* 807 NE 2d 58 (Ind App, 2004).

merge the convictions and vacate the sentence of the jeopardy-prohibited offense.[45] Still other courts merge both the conviction and sentence.[46]

The Court of Appeals developed a logical rule in *Bigelow* as it pertains to the double jeopardy implications of dual convictions for a single killing. To maintain consistency and avoid the problems that arise from vacating a conviction, this Court should adopt the *Bigelow* merger rule and extend it to double jeopardy issues that arise from convictions for felony-murder and the underlying felony. Instead of simply vacating the jeopardy-prohibited conviction, the better and more consistent remedy to protect the defendant's rights against double jeopardy and avoid later "real-world" practical consequences on reversal of the murder count is to modify the order of judgment and sentence to reflect one first-degree murder conviction and one sentence. The defendant's conviction and sentence for the underlying felony, like the alterative first-degree murder convictions and sentences, should also be merged. The defendant would serve one sentence – not concurrent sentences – and the risk of any collateral consequences that separate convictions may entail would be eliminated. Under this practice, the underlying felony conviction "remains intact" but has no collateral consequence, unless the felony-murder offense is later reversed.[47] By merging all the

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[45] *State v Barber*, 64 Conn App 659, 677-678 (Conn App, 2001); *State v Chicano*, supra, at 712.; *United States v Moya-Gomez*, 860 F2d 706, 752-54 (7th Cir1988)(where the court "suspended" sentence); *United States v Grayson*, 795 F 2d 278, 287 (3d Cir1986); *State v Stevenson,* 85 Conn App 811 (Conn App, 2004).

[46] *Underwood v United States* 166 F3d 84, 85 -86 (C.A.2,1999); *Lindsay, supra,* 985 F 2d 666; *State v Santillanes*, 130 NM 464, 467-468 (N M, 2001)(ruling that merger of convictions is a remedial measure in response to a violation of the double jeopardy protection against multiple punishments for a single offense); *United States v Benevento* 836 F2d 60, 73 CA 2 (NY),1987) , abrogated on other grounds, *United States v Indelicato*, 865 F2d 1370, 1379 (CA 2 (NY),1989); *United States v Ganci, supra,* 47 F3d at 73 -74.

[47] *United States v Ganci, supra,* 47 F 3d at 73 -74.

convictions *and* sentences, any danger of subsequent reversals does not result in the defendant completely escape punishment for the crimes for his crime.[48]

Moreover, since the trial court imposes sentence for the underlying felony, albeit merged, it is not "merged out of existence."[49] The original sentence also remains intact so that it may simply be enforced without the necessity of remanding for re-sentencing, should the felony-murder conviction be reversal at a later time. This practice avoids that needless use of judicial resources after a number of years when memories have faded and victims, witnesses or judges may no longer be available, as is often the case. Since the later vacating of the felony-murder conviction and sentence "gives appellant all the relief to which he is entitled, a remand is thus unnecessary."[50]

It is evident that the "important real-world consequences" that flow from "vacating" a conviction have been litigated extensively in other jurisdictions. Since the *Bigelow* merger rule is a logical remedy to double jeopardy issues, whether they arise from dual first-degree murder convictions or separate convictions for felony-murder and the underlying felony, this Court should adopt it as a consistent remedy under both circumstances.

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[48] *Lindsey, supra,* citing *Aiello* 771 F 2d at 634.

[49] *United States v Osorio Estrada*, 751 F 2d 128, 133-35 (2d Cir1984).

[50] *Ganci, supra.*

CONCLUSION/ SUMMARY

- *Bigelow* correctly ruled that the appropriate remedy to protect a defendant's rights against double jeopardy where he had dual convictions for both premeditated and felony-murder arising from death of single victim is to modify the judgment of conviction and sentence to specify one first-degree murder conviction supported by two theories: premeditated murder and felony-murder. This rule better served justice and protected against the problem that could arise if a later appeal caused the reversal of premeditated murder and thus vacating the first-degree murder conviction in total.

- As the predicate-based offenses and their predicate offenses are "legislatively related" rather than "logically related"and prohibits conduct that is violative of distinct social norms, the Legislature intended to create separate offenses for which multiple punishments may be had so that convictions and sentences for both offenses do not offend the right against double jeopardy. Thus this Court should overrule *Wilder*.

- Even if this Court does not overrule *Wilder*, if a conviction for first-degree murder is also supported by the alternative theory of premeditation, so that the separate conviction is no longer necessarily predicate, a separate conviction and sentence for the underlying felony does not violate jeopardy.

- Even if this Court does not overrule *Wilder*, the "important real-world consequences" that flow from "vacating" a conviction is evidenced by the extensive litigation and inefficient use of judicial resources that occurs from inconsistent and confusing policies treating like issues differently. Since the Court of Appeals has developed a logical rule in *Bigelow* as it pertains to the double jeopardy implications of dual convictions for a single killing, it is reasonable and consistent for this Court to extend that rule to double jeopardy issues that arise from convictions for felony-murder and the underlying felony. The judge should sentence on the predicate offense and the judgment order should reflect that the count and sentences are merged with the murder count.

RELIEF

WHEREFORE, the People request that this Court either grant the People's application for leave to appeal or peremptorily reverse the decision of the Court of Appeals and reinstate Defendant's conviction and sentence for larceny from a person.

Respectfully submitted,
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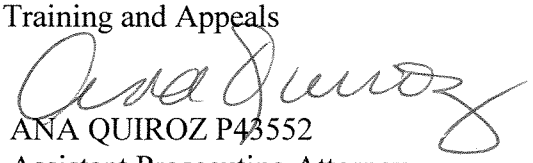

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